RECORD AND BRIEF

No. 141, Original

Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO THE MOTION OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 FOR LEAVE TO INTERVENE

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STATEMENT OF THE CASE

In this original action, Texas seeks enforcement of the Rio Grande Compact (Compact) against New Mexico. The United States has intervened, and New Mexico filed a motion to dismiss both Complaints. The Court appointed A. Gregory Grimsal Special Master on November 3, 2014, and referred the case to him. Elephant Butte Irrigation District (EBID), a political subdivision of New Mexico, moved to intervene in December 2014. *See* Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum of Points and Authorities. New Mexico, Texas, and the United States have all opposed EBID's motion. New Mexico's motion to dismiss and EBID's motion to intervene are currently pending before the Special Master. El Paso County Water Improvement District No. 1 (EPCWID), a Texas political subdivision that receives water from the Rio Grande Project, now also requests leave to intervene in this case. Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as a Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as a Plaintiff (EPCWID Mem.).

SUMMARY OF ARGUMENT

EPCWID is now the second political subdivision of a State party to move to intervene in this case. EPCWID is a political subdivision wholly within Texas, serving lands in Texas with contracted water

from the Rio Grande Project (Project), a federal reclamation project. Despite being a wholly intrastate entity of Texas, and having no special interest or role in the Compact, it alleges its interests in the Project are sufficiently unique to justify its intervention in this interstate compact action. EPCWID further claims it is not adequately represented by either its State of incorporation – despite the fact that Texas is a party to the Compact and to this suit – or by the United States, which is also a party to this suit, and with which EPCWID contracts for water from the Project. EPCWID is incorrect. It does not meet the standard for intervention herein.

Compact enforcement actions arise out of a fundamental aspect of State sovereignty: a State's jurisdiction over its water. As such, informed by the doctrine of *parens patriae* and respect for State sovereignty, the Court generally does not allow a citizen of a State already a party to the action to intervene. EPCWID has failed to articulate any reason justifying its intervention here.

Contrary to its claim, EPCWID is not a bi-state entity, nor does it have any role in Compact administration or enforcement. Colorado, New Mexico and Texas are the signatories to the Compact and fully represent their water users with respect to the Compact. EPCWID's position with respect to Texas' Complaint is that of one water user among many others in Texas, all of which draw from Texas's share of water under the Compact. The Court should deny EPCWID's motion because EPCWID's interest is

neither compelling nor unique and its interests are already properly represented by Texas.

ARGUMENT

I. EPCWID FAILS TO MEET THE HIGH STANDARD FOR INTERVENTION IN INTERSTATE COMPACT DISPUTES

"Respect for state sovereignty . . . calls for a high threshold to intervention" by nonstate entities such as EPCWID to guard against the use of the Court's original jurisdiction "as a forum in which 'a state might be judicially impeached on matters of policy by its own subjects.'" *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). A controversy between States implicates matters of State sovereignty that rise "above a mere question of local private right." *Kansas v. Colorado*, 206 U.S. 46, 99 (1907). The States alone possess the "core state prerogative to control water within their own boundaries," and the Court's adjudication of their rights under the Compact is informed by the presumption that the States have retained their sovereignty. *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132-2133 (2013). Thus, a State in its sovereign capacity "represents the interests of its citizens in an original action, the disposition of which binds the citizens." *South Carolina v. North Carolina*, 558 U.S. at 267; *see Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995) ("Ordinarily, in a suit by one State against another

subject to the original jurisdiction of this Court, each State 'must be deemed to represent all its citizens.' A State is presumed to speak in the best interests of those citizens. . . .") (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)). Not surprisingly, the Court has never allowed a political subdivision of a State to intervene over the objection of that State in a compact enforcement case.

Therefore "the standard for intervention in original actions by nonstate entities is high – and appropriately so." *South Carolina v. North Carolina*, 558 U.S. at 267. States, in negotiating interstate compacts and in resolving disputes that arise from them, must consider their State needs in their entirety. Individual intrastate entities may disagree with their States on certain positions, but they are necessarily bound by their States whose interests, not those of intrastate entities, are in issue in a compact case. Thus, an intervenor whose State is already a party bears "the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373). This standard "serves the twin purposes of ensuring that due respect is given to 'sovereign dignity' and providing 'a working rule for good judicial administration.'" *Id.* (quoting *New Jersey v. New York*, 345 U.S. at 373). Unless a nonstate entity can meet this high standard, its motion to intervene generally "will be denied." *Nebraska v. Wyoming*, 515

U.S. at 21-22; *see South Carolina v. North Carolina*, 558 U.S. at 266; Memorandum Opinion of the Special Master on the Motion of Anadarko Petroleum Corporation for Leave to Intervene at 3-6, *Montana v. Wyoming*, No. 137, Original (Dec. 18, 2009).

Moreover, a high standard for intervention is necessary to ensure that original actions, which already "tax the limited resources" of the Court, "do not assume the 'dimensions of ordinary class actions.'" *South Carolina v. North Carolina*, 558 U.S. at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373). If a nonstate entity could intervene merely on the basis of a difference of opinion with its sovereign, "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *New Jersey v. New York*, 345 U.S. at 373.

As explained below, EPCWID cannot meet either of the prerequisites for intervention. First, it cannot show a compelling and unique interest that sets it apart from the class of all other citizens and creatures of Texas. Second, it cannot show that its interest in this action is not already properly represented. In its own words, any specific interests it may have derive from a reclamation project, not the Compact which is the center of this case.

II. EPCWID'S INTEREST IS NEITHER COMPELLING NOR UNIQUE

EPCWID has failed to show that it has a "'compelling interest'" in its own right, "'apart from [its]

interest in a class with all other citizens and creatures of the state.'" *See South Carolina v. North Carolina*, 558 U.S. at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373). EPCWID is a political subdivision of Texas. As such, the only interests that it represents are the interests of irrigators and other water users within its territorial boundaries, which lie wholly within Texas. It is not a bi-state entity, and its claim to have "bi-state interests," *e.g.*, EPCWID Mem. 14, is unfounded. Though the Project serves lands in two States, EPCWID is just the Texas district with no material rights or obligations vis-à-vis the New Mexico lands. EPCWID has presented no other persuasive reason to conclude that it has a compelling interest distinct from the interests of the other citizens and political subdivisions of Texas. Nor is its participation as an intervenor necessary to the resolution of the States' dispute in this action.

A. As a Political Subdivision of Texas, EPCWID Cannot Demonstrate a Compelling Interest in Its Own Right

The Court has consistently held that political subdivisions such as EPCWID, whose States are already parties to original actions, do not meet the high standard for intervention, even where the importance of their interests is substantial. *E.g.*, *New Jersey v. New York*, 345 U.S. at 373-374 & n.* (Philadelphia failed to show a compelling interest, despite representing half of all Pennsylvania citizens in the Delaware River watershed). Political subdivisions

typically are not allowed to intervene because if the Court undertook to evaluate "all the separate interests within [a State]," it "could, in effect, be drawn into an intramural dispute over the distribution of water" within a State. *Id.* at 373; *see also South Carolina v. North Carolina*, 558 U.S. at 274-275 (Charlotte failed to show a compelling interest because it occupied "a class of affected North Carolina users of water," and "the magnitude of Charlotte's authorized transfer d[id] not distinguish it in kind from other members of the class."). A political subdivision's interest in a State's share of an interstate river's water falls "squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." *Id.* at 274 ("[A] State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State, as *parens patriae*, represents on behalf of its citizens.").

EPCWID is in materially the same position as Philadelphia and Charlotte. It concededly is a political subdivision of Texas created pursuant to the Texas Constitution. *See* EPCWID Mem. 1. As a creature of Texas, it is subject to Texas law. *See id.* at 1-2 (stating that EPCWID is "a general law water improvement district subject to Chapter 55 of the Texas Water Code Annotated, performing governmental functions and standing on the same footing as counties and other political subdivisions"). Pursuant to Texas law, it is responsible for distributing water to Texas water users, with authority to "'provide for irrigation of

land within its boundaries'" and "'furnish water for domestic, power, and commercial purposes'" to other end users of water in Texas. *Id.* at 2 (quoting Tex. Water Code Ann. § 55.161). EPCWID does not claim to represent the interests or serve the water needs of anyone in New Mexico. Project interests in New Mexico are served by EBID.

EPCWID, like the cities of Philadelphia or Charlotte, thus represents the interests of water users within its territory and is responsible for delivering water to those residents. EPCWID does not "represent interstate interests that fall on both sides of this dispute." *South Carolina v. North Carolina*, 558 U.S. at 274. To the contrary, it "represents the interests of Rio Grande Project water users *in Texas*." EPCWID Mem. 16 (emphasis added). Of necessity, it concedes that Texas also represents all Rio Grande Project water users in Texas. *Id.* at 24 (acknowledging that a "state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens'") (quoting *New Jersey v. New York*, 345 U.S. at 372-373) (quoting *Kentucky v. Indiana*, 281 U.S. at 173-174)). By seeking to intervene in this original action, however, EPCWID claims the very power that the Constitution reserves to Texas: the power to represent the citizens and water users of the State with respect to the adjudication of rights and duties under an interstate Compact. *See* U.S. Const. art. I, § 10, cl. 3. The interests that EPCWID seeks to represent in this Court fall "squarely within the category of interests with respect to which a State

must be deemed to represent all of its citizens." *South Carolina v. North Carolina*, 558 U.S. at 274.

B. EPCWID Is Not a Bi-State Entity or an Entity with Unique Interests Whose Participation Is Necessary to the Resolution of This Action

1. EPCWID Is Not a Bi-State Entity

EPCWID cannot show that it is comparable in any material way to either of the two entities that the Court has permitted to intervene in an equitable apportionment action, *viz.*, the Catawba River Water Supply Project (CRWSP) and Duke Energy Carolinas, LLC (Duke Energy). *Id.* at 269-273; *see id.* at 277 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Even though equitable apportionment actions are a significant part of our original docket, this Court has never before granted intervention in such a case to an entity other than a State, the United States, or an Indian tribe. Never.").

Unlike a political subdivision of one State dedicated to the interests of water users within that State, CRWSP served the water needs of approximately 100,000 individuals in each of the two States, transferring roughly half of its total withdrawals of water from the Catawba River to South Carolina consumers. *Id.* at 269. It was owned by counties in both States, had an advisory board with representatives from both States, operated infrastructure and assets owned by those counties, received revenues from

water sales in both States, and "relie[d] upon authority granted by both States to draw water from the Catawba River." *Id* at 261, 269. As the Court observed, it was "difficult to conceive of a more purely bistate entity." *Id* at 269.

Duke Energy likewise had a compelling interest that was not specific to one State or the other. It operated 11 dams and reservoirs in both North and South Carolina, through which it generated electricity for the entire region and controlled the flow of the river through the States. *Id.* at 272. There was no other similarly situated entity on the Catawba River. *Id.* Moreover, it had a unique and compelling interest in protecting the terms of its federal regulatory license, which governed the river's minimum flow into South Carolina. *Id.* at 261-263, 272-273. Duke Energy thus had a direct, distinct interest in the subject matter of the equitable apportionment action. *Id.* at 273.

EPCWID argues that it is "similarly situated" to both CRWSP and Duke Energy because it has "bi-state interests" that distinguish it from other water users and creatures of Texas. *See* EPCWID Mem. 14, 16, 18. Unlike CRWSP, EPCWID's authority is granted solely by Texas; EPCWID claims no authority or legal existence in New Mexico. *See id.* at 1-2. EPCWID's supposed bi-state interests are rights adjudicated solely by a Texas State court, as certified by a Texas State agency, to store and release Rio Grande water in New Mexico "for diversion and use in Texas." *Id.* at 18. But a Texas court has no extraterritorial jurisdiction to decree water rights in New Mexico. *See*

Lindsey v. McClure, 136 F.2d 65, 70 (10th Cir. 1943) (State water statutes "have no extraterritorial effect"); *Baker v. General Motors*, 522 U.S. 222, 235 (1998) (State court orders cannot be enforced in a sister State when they purport "to accomplish an official act within the exclusive province of that other State"); *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 924 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957) (New Mexico appropriation had no "extra-territorial force" in Texas).[1] By EPCWID's own assertion, then, its claimed "bi-state" interest derives solely from Texas, through a Texas court and a Texas agency.

EPCWID also claims to have "bi-state interests" in "the complex system of irrigation infrastructure of the interstate Project," which "crosses (indeed criss-crosses) state lines." EPCWID Mem. at 17-18. According to the Bureau of Reclamation's Official Report to the Rio Grande Compact Commission, however, "the [Rio Grande Project's] irrigation and drainage system is owned, operated, and maintained by [EBID] in the New Mexico portion of the Rio Grande Project and by [EPCWID] in the Texas portion of the Project."

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[1] Even by its own terms, the decree does not purport to grant EPCWID "storage and release" rights in New Mexico; it recognizes these rights solely in the United States. EPCWID Mem. App. 10. The United States appropriated the Project storage rights in New Mexico under New Mexico law. 43 U.S.C. § 383. EPCWID's Texas Certificate of Adjudication recognizes EPCWID's right to use Project water only within Texas. *Id.* at App. 13.

Bureau of Reclamation, *Calendar Year 2012 Report to the Rio Grande Compact Commission* at 47 (March 2013).[2] The fact that canals may cross a stateline is an unremarkable feature of modern irrigation systems. Indeed, EPCWID admits that it provides water exclusively "within EPCWID's boundaries in El Paso County, Texas." EPCWID Mem. 3. As "a political subdivision of the State of Texas," *id.* at 1, EPCWID is therefore a purely Texas entity representing purely Texas interests. It has no bi-state oversight, revenues, sales, customers, or constituents, and it cannot exercise its powers of taxation and eminent domain outside of Texas. It bears no resemblance to a "purely bistate entity" such as CRWSP, and it does not hold the type of bi-state license held by Duke Energy. *South Carolina v. North Carolina*, 558 U.S. at 269.

2. EPCWID's Allocation of Project Water Does Not Give It a Unique Interest

EPCWID argues that it should be allowed to intervene by virtue of "'water-use rights that are not dependent upon the rights of state parties.'" EPCWID Mem. 19 (quoting *South Carolina v. North Carolina*, 558 U.S. at 282 n.1 (Roberts, C.J., concurring in the judgment in part and dissenting in part)). Specifically, EPCWID claims "a right to a certain quantity of water pursuant to [EPCWID's] interests

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[2] Available at https://www.usbr.gov/uc/albuq/water/RioGrande/rpts/Final2012RGCCReport.pdf.

in the Project, its federal reclamation contracts, and the Texas decree." *Id.* Contrary to EPCWID's contention, however, its asserted interest is indeed "dependent upon the rights of state parties." *South Carolina v. North Carolina*, 558 U.S. at 282 n.1 (Roberts, C.J., concurring in the judgment in part and dissenting in part). It is dependent on the rights of Texas, in particular, because "[t]he interests of a State's citizens in the use of water derive entirely from the State's sovereign interest in the waterway." *Id.* at 279. While a political subdivision may hold a real property interest in land to the exclusion of the State in which it is located, EPCWID Mem. 22 (citing *Texas v. Louisiana*, 426 U.S. 465, 466 (1976) (per curiam)), EPCWID's asserted interest in the waters of the Rio Grande differs from a real property interest in a parcel of land for the "straightforward" reason that "[a]n interest in water is an interest shared with other citizens, and is properly pressed or defended by the State." *South Carolina v. North Carolina*, 558 U.S. at 279 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

EPCWID's interests in the Project and in its federal reclamation contracts with the United States are not exclusive or independent of Texas's sovereign interest in the waters of the Rio Grande under the Compact. To the contrary, as EPCWID elsewhere acknowledges, it receives Project water appropriated by the United States for the Project under the law of Texas for the Texas lands, and delivers that water to identified irrigable lands in Texas. 43 U.S.C. § 383;

Nebraska v. Wyoming, 325 U.S. 589, 629-630 (1945) (recognizing the United States' appropriation of water under Wyoming law for use in both Wyoming and Nebraska). Texas's claim to its "share of water apportioned under the Compact" is properly pressed by Texas alone. EPCWID Mem. 7.

EPCWID has failed to articulate any principled basis for allowing it to intervene that would not also entitle any number of similarly situated entities in New Mexico and Texas to intervene. *See New Jersey v. New York*, 345 U.S. at 373 (recognizing that if Philadelphia were granted intervention, "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties"). Not only has another irrigation district, EBID, already sought to intervene, but other political subdivisions, including Hudspeth County Conservation and Reclamation District No. 1 and the City of El Paso in Texas, may seek to intervene as well. All of those entities receive deliveries of Project water. In short, EPCWID does not stand apart from the other public and private entities in the Rio Grande Basin who claim an interest in diverting and using the waters of the Rio Grande. *See South Carolina v. North Carolina*, 558 U.S. at 287 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("To the extent intervention is allowed for some private entities with interests in the water, others who also have an interest will feel compelled to intervene as well – and we will be hard put to refuse them.").

C. EPCWID Has No Role in Compact Administration Nor Any Right Under the Compact Distinct from Other Texas Citizens

The subject of the dispute in this original action is the respective rights the States bargained for and Congress ratified in the Compact. *See* Texas' Complaint ¶¶ 4, 10-28. In compact enforcement cases, like this one, the Court will interpret and apply the compact the States negotiated and ratified on behalf of their citizens. *See Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2133, 2135. However, the Compact apportions no water to EPCWID or its New Mexico counterpart, EBID, nor does it confer any rights or obligations on these entities to administer or ensure compliance with its terms. Neither EPCWID nor EBID is mentioned in the Compact. EPCWID has no unique or compelling interest in the meaning or the application of the Compact apart from the interests of the States named as parties to the Compact and as parties to this original action.

EPCWID claims that its "direct stake in the Project supports its intervention." EPCWID Mem. 14-15. But the United States, not EPCWID, owns and operates the Project dams and reservoirs. EPCWID's responsibility, like that of EBID in New Mexico, is to operate Project facilities in Texas and manage Project deliveries to EPCWID's members in Texas. These responsibilities relate to purely intrastate matters that arise only after the States' respective rights under the Compact have been satisfied. In short, EPCWID's

concerns arising from its role as operator of Project facilities in Texas have no relevance to the instant dispute over the respective rights of the signatory States under the Compact. EPCWID thus fails to assert any interest in the Compact that would distinguish it from the class of all other citizens and political subdivisions with an interest in Texas' share of the waters of the Lower Rio Grande.

D. EPCWID's Reliance on Intervention by Nonstate Entities in Other Original Actions Is Misplaced

Though EPCWID claims "unique interests . . . akin to those interests found sufficient to support intervention in prior original action cases," EPCWID Mem. 21, none of the entities that were permitted to intervene in the cases EPCWID cites is analogous to EPCWID. For instance, in *Arizona v. California*, 460 U.S. 605 (1983), the Court allowed several Indian tribes to intervene in a dispute between Arizona and California over the waters of the Colorado River, notwithstanding their prior representation in the case by the United States. Unlike the tribes, whose rights were not subordinate to rights of the United States, EPCWID's right is subordinate to Texas' apportionment of Rio Grande water. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (recognizing that compact apportionment "is binding upon the citizens of each State and all

water claimants").[3] And unlike the tribes, EPCWID is not a sovereign entity in its own right, so the rule of *New Jersey v. New York* squarely applies, as EPCWID acknowledges. *See* EPCWID Mem. 12.

In *Oklahoma v. Texas*, 258 U.S. 574, 580 (1922), and *Texas v. Louisiana*, 416 U.S. 965 (1974), the Court allowed the intervention of nonstate parties in two original actions to resolve conflicting land ownership claims asserted by the nonstate parties, claims whose resolution depended, in turn, on the resolution of boundary disputes between the States. Here, no party has raised any issue concerning EPCWID's land ownership right. EPCWID's rights to water derive from Texas' Compact apportionment, and its right to delivery of that water derived from Project contracts under reclamation law. 43 U.S.C. § 383. *Oklahoma v. Texas* is further distinguishable because it was decided well before *New Jersey v. New York*

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[3] In *Alaska v. United States*, the Special Master found that even Indian Nations could not intervene in an original action where they lacked a direct interest in the litigation in the form of a claim of title to the land, even though they asserted the litigation would affect their ability to use the disputed land and gather important traditional foods. Report of the Special Master on the Motion to Intervene by Franklin H. James, The Shakan Kwaan Thling-Git Nation, Joseph K. Samuel, and the Taanta Kwaan Thling-Git Nation, *Alaska v. United States*, No. 128, Original, at 17-18 (Nov. 2001). Like the Nations in *Alaska v. United States*, EPCWID has no direct interest upon which to base its intervention, as the Compact apportions the water among the states, and EPCWID's claims are therefore dependent upon and derivative of Texas' Compact apportionment.

announced the modern rule governing nonstate intervention in original actions.

Moreover, *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981), which permitted a number of gas pipeline companies to intervene in an original action challenging a Louisiana tax on natural gas, does not counsel in favor of intervention here. EPCWID argues it is similar to the pipeline companies because its presence as a party "will allow 'full exposition of the issues'. . . . " EPCWID Mem. 22 (quoting *Maryland v. Louisiana*, 451 U.S. at 745 n.21). EPCWID's belief that it can contribute to a "full exposition" of Project issues, *id.*, does not provide a basis for intervention herein, where the only exposition that matters is the States' respective rights in the Compact.

In sum, the States as sovereign parties to an original action presumptively represent all of their "citizens and creatures." *South Carolina v. North Carolina*, 558 U.S. at 266-267. EPCWID has not carried its burden of overcoming that presumption by showing that it has an interest "apart" and different in kind from those of all other citizens and creatures of Texas. *Id.* at 266.

III. EPCWID'S INTEREST IS REPRESENTED BY TEXAS

EPCWID has also failed to show that its asserted interest in this original action "'is not properly represented'" by Texas. *Id.* (quoting *New Jersey v. New York*, 345 U.S. at 373). To reiterate, the Court

presumes that a State in its sovereign capacity represents the interests of all of its citizens and creatures. *Id.* at 267; *Nebraska v. Wyoming*, 515 U.S. at 21-22. The interests of the States in representing all of their citizens and political subdivisions are stronger in an original action arising under an interstate compact than in an equitable apportionment action, because in the former, the States' apportionment agreement is the central question, whereas in the latter, the Court apportions the river among the States under its equitable jurisdiction. Yet, even in an equitable apportionment action, the States are deemed to represent their citizens by virtue of the *parens patriae* doctrine. *South Carolina v. North Carolina*, 558 U.S. at 266. The State's interest as *parens patriae* "has been characterized as a 'quasi-sovereign' interest." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). Even when the State properly acts as *parens patriae*, the "flexible" nature of an equitable apportionment action allows the Court "to seek out the most relevant information from the source best situated to provide it," which may include the individual interests of nonstate entities. *Id.* at 271-272 (citing *Maryland v. Louisiana*, 451 U.S. at 745 n.21).

By contrast, in an original action to interpret and apply an interstate compact, there is nothing "quasi" about the States' sovereign interests. *See Hinderlider*, 304 U.S. at 106 (citing *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 209 (1837)). The States' sovereign interests in this action derive not from the amorphous "judicial

construct" of the *parens patriae* doctrine, *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601, but directly from their retained sovereignty as acknowledged in the Constitution, U.S. Const. amend. X, and their status as parties to the Compact. Each State, as a signatory to the Compact, "unquestionably" has "a direct interest of its own" and properly takes "full control" of the litigation on behalf of its citizens where the Compact's meaning and application are at issue. *Kansas v. Colorado*, 533 U.S. 1, 8 (2001). As in other contract actions, the Compact's meaning is determined not by way of an open-ended search for input from all available sources, *South Carolina v. North Carolina*, 558 U.S. at 272, but strictly in accordance with the intentions of the compacting parties: "In this endeavor, as with any other contract, the parties' intentions control." *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (internal quotation omitted); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("'[A] Compact is, after all, a contract.' It remains a legal document that must be construed and applied in accordance with its terms.") (quoting *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)).

EPCWID argues that its interests "are not adequately represented by Texas in this case" because Texas is not a Project contract holder. EPCWID Mem. 24-25. But EPCWID fails to overcome the presumption that Texas as the signatory to the Compact properly represents the interests of all of its citizens. *New Jersey v. New York*, 345 U.S. at 372. Texas was

among the negotiators and signatories of the Compact and represents EPCWID in *parens patriae* herein. EPCWID's interests in the Project have no bearing on Compact interpretation. Just because Texas is not a named party to the reclamation contracts for the use and distribution of Project water does not mean Texas has no interest in protecting the rights of its citizens, including EPCWID. The Commonwealth of Pennsylvania, in *New Jersey v. New York*, had no direct interest in the City of Philadelphia's water contracts or infrastructure, for which Philadelphia was solely responsible under its Home Rule Charter. 345 U.S. at 374. Despite this, the Court found that Pennsylvania adequately represented Philadelphia's interests because the city's interests were "invariably served by the Commonwealth's position." *Id.* The same is true here.

The very fact that Texas initiated this action demonstrates that Texas has sought and will continue to represent and protect EPCWID's interests with respect to Rio Grande water and this litigation. Indeed, EPCWID seeks the same general relief put forth by Texas: an injunction prohibiting New Mexico from permitting interception and interference with Rio Grande water in New Mexico. *Compare* EPCWID Complaint at 2, *with* Texas Complaint at 15-16. The fact that Texas and EPCWID seek essentially the same relief underscores Texas' ability to fully represent EPCWID's interests in this litigation. *See, e.g.*, Response of the State of Texas in Opposition to Request to Participate in Oral Argument by Amicus

Curiae El Paso County Water Improvement District No. 1, No. 141, Original, at 2 (Apr. 30, 2015) (Texas affirmatively stating that it adequately represents EPCWID and "EPCWID offers no substantive arguments not already presented by Texas").

To whatever extent EPCWID has different views from Texas on particular issues, those differences are not relevant to this Court's determination of Texas' rights and obligations under the Compact. Disagreements between and among the citizens of a State are a fact of life in a pluralistic society. The Court's concern that it not be "drawn into an intramural dispute over the distribution of water" presupposes that disputes within a State can and do exist. *New Jersey v. New York*, 345 U.S. at 373. Intramural disagreements will not justify a nonstate entity's intervention for the precise reason that, if they did, the State "'might be judicially impeached on matters of policy by its own subjects.'" *South Carolina v. North Carolina*, 558 U.S. at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373); *see id.* at 280 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("The State 'must be deemed to represent *all* its citizens,' not just those who subscribe to the State's position before this Court. The directive that a State cannot be 'judicially impeached on matters of policy by its own subjects' obviously applies to the case in which a subject disagrees with the position of the State.") (quoting *New Jersey v. New York*, 345 U.S. at 372, 373) (additional citation and internal quotation marks omitted). The States properly represent the interests of their

respective citizens and political subdivisions in this Court whether or not they agree on all issues.

CONCLUSION

EPCWID's motion for leave to intervene should be denied.

Respectfully submitted,

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